Filed 12/8/09 In re E.T. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re E.T., a Person Coming Under the Juvenile Court Law.	B213390 (Los Angeles County Super. Ct. No. TJ 17521)
THE PEOPLE, Plaintiff and Respondent, v. E.T., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Scarlett, Judge. Affirmed.

Bruce G. Finebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

A Welfare and Institutions Code section 602 petition alleged appellant E.T. committed one count of forcible lewd act upon a child in violation of Penal Code section[1] 288, subdivision (b)(1). The juvenile court sustained the petition at the adjudication hearing. Appellant timely appealed from the judgment entered after the disposition hearing at which the court declared appellant a ward of the court and ordered appellant's physical custody be taken from his parents or guardian and committed to the care and custody of the probation department for the purposes of suitable placement with a maximum confinement term of eight years. Appellant contends the court erred in admitting his statements to police as they had been obtained in violation of his *Miranda* rights and there was no substantial evidence supporting the true finding. We affirm.

STATEMENT OF FACTS

I. Prosecution Evidence

Five-year-old J.M. was appellant's cousin. In April 2008, J.M. and her four-year-old brother were at appellant's house, being babysat by appellant's mother. J.M. went inside appellant's bedroom to watch a movie. Also present in the bedroom were appellant, appellant's one-year-old sister, J.M.'s brother, and another girl, who was not related to appellant or J.M.

Appellant, who was 16 years old, closed and locked the bedroom door. Appellant laid J.M. down on the bed and pulled down her pants and underwear. Appellant then started to "poke" J.M.'s buttocks with his "private part." J.M. estimated that happened 14 times. That hurt J.M., and she asked appellant to stop; she was crying.

Appellant put a blanket in J.M.'s mouth and told her to bite it. J.M. tried to get up and leave, but she was not able to do so. J.M. was scared. While appellant was still poking J.M.'s buttocks, her father knocked on the bedroom door. Appellant told J.M. to

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[1] Unless otherwise noted, all statutory references are to the Penal Code.

pull up her pants. After leaving appellant's house, J.M. told her father what had happened.

On May 30, Detective Michael Silva of the Los Angeles County Sheriff's Department went to appellant's high school and interviewed him in the school resource officer's office. Silva told appellant that he was not under arrest and that he was free to leave at any time. Appellant agreed to talk to Silva. The interview lasted 30 minutes.

Silva spoke to appellant about J.M., and appellant acknowledged his mother babysat J.M. and her younger brother. When Silva asked about the day of the incident, appellant mentioned he had disciplined J.M. by slapping her on her side after she had knocked over a box of shoes in his bedroom. Appellant initially denied any sexual contact. Silva used a ruse, falsely stating DNA had been recovered from J.M. and there was a possibility it would match appellant's DNA. Appellant asked to speak to Silva alone (the school resource officer had been walking in and out of the room during the interview).

After the resource officer left the room, appellant stated that before the incident with J.M., he had engaged in "heavy petting" with his girlfriend and had become sexually aroused. Appellant said that when he went home, he was lying on his bed, and J.M. lightly brushed his groin area with her hand. Appellant said he then had J.M. lay on her stomach, and he placed lubricant on her anus and attempted to insert his penis. Appellant then heard someone knocking on the door, so he and J.M. got dressed.

II. Defense Evidence

Appellant testified and denied any sexual contact with J.M. On the afternoon of April 10, J.M. was at appellant's house. J.M. was inside appellant's bedroom along with J.M.'s brother, appellant and appellant's two little sisters. Appellant was in the closet looking for shoes to wear to a party the next day. J.M. offered to help appellant, but he told her to go away. J.M. then tripped over a box. Appellant pushed J.M., and she started to cry. J.M. went over to the bed. Appellant closed the bedroom door because

one of his little sisters kept knocking on the door and then leaving. There was a knock on the door. Appellant kept looking for his shoes and told J.M. to open the door. When J.M. failed to open the door, appellant eventually opened the door and saw J.M.'s father. J.M. was not crying at the time.

On May 30, the school security officer removed appellant from class and took him to the resource office. Students are usually not allowed there unless they had done something "bad" or gotten into a fight. When speaking with Silva, appellant initially denied any improper sexual contact with J.M. When Silva kept insisting that appellant had done something to J.M. and claimed there was DNA evidence, appellant "just started getting crazy." Appellant stated he had not been telling the truth; he "just wanted to get over it." At one point, appellant asked to go to lunch and to use the bathroom, but Silva told him to remain seated.

Appellant's 12-year-old sister testified she was in appellant's room around 4:20 p.m. on April 10. Appellant closed the bedroom door because their other sister was bothering him. His sister went to the restroom. J.M.'s father arrived and knocked on the bedroom door. Appellant did not answer the door right away because he thought it was his other sister knocking on the door. When appellant eventually opened the door, J.M. exited the room. J.M. was not crying. J.M. was playing with her brother, who pushed her, causing her to fall down. J.M. looked like she wanted to cry, and her father told her they had to leave.

Appellant's uncle was at the appellant's house on April 10 sitting at the kitchen table. Appellant's other sister was going in and out of appellant's bedroom and bothering the other children. Appellant became angry and closed the bedroom door. Three minutes later, J.M.'s father arrived and knocked on appellant's door. J.M. exited the bedroom and was not crying. J.M. was playing with her brother.

Deputy Sheriff Ermina McKelvy interviewed J.M. on April 11. J.M. never said that appellant placed a blanket in her mouth (although she said there was a blanket over her head). J.M. stated appellant "poked" her, but she did not mention it had happened 14 times. J.M. stated appellant had poked her with his finger. J.M. said appellant had told

her to be quiet and, "'It's your fault.'" J.M. said she was so scared that she did not want to tell anyone what had happened.

DISCUSSION

I. *Miranda* Warnings

During the evidentiary portion of the instant trial, Detective Silva and appellant testified about Silva's interview of appellant. Silva testified appellant stated that before the incident with J.M., he had engaged in "heavy petting" with his girlfriend and had become sexually aroused. Appellant said that when he went home, he was lying on his bed, and J.M. lightly brushed his groin area with her hand. Appellant said he then had J.M. lay on her stomach, and he placed lubricant on her anus and attempted to insert his penis. Appellant then heard someone knocking on the door, so he and J.M. got dressed. Appellant did not object to the admission of his statements to Silva.

Appellant contends the court erred in admitting his statements as they were obtained in violation of *Miranda*. "After being taken into custody by police or otherwise deprived of his or her freedom of action in any significant manner, a person must be given *Miranda* warnings apprising the person of his or her right to remain silent, that any statement the person makes may be used against the person and that the person has the right to counsel, retained or appointed. Statements elicited in noncompliance with this rule may not be admitted for certain purposes in a criminal trial." (Citation omitted.) (*In re Kenneth S.* (2005) 133 Cal.App.4th 54, 63.)

Respondent contends appellant forfeited this claim because he did not make a timely and specific objection on the ground urged on appeal. (See *People v. Waidla* (2000) 22 Cal.4th 690, 717.) Thus, respondent argues the party (the prosecutor) proferring the evidence was not able to cure the defect in the evidence (e.g., the prosecutor could have introduced the tape recording of the interview).[2] (See *People v.*

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[2] The interview was recorded, but not introduced into evidence.

Mattson (1990) 50 Cal.3d 826, 853-854.) Respondent also asserts that a claim that statements to the police should be excluded generally will not be addressed for the first time on appeal when the accused's failure to raise the claim earlier deprived the parties of the incentive to litigate the issue and the court had no opportunity to make factual findings and resolve the claim. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 392, fn. 1.)

During appellant's closing argument, when his counsel made a motion to dismiss the action for lack of substantial evidence of force, the court noted it was a question of fact whether force had been used and asked about appellant's confession. At that point, for the first time, appellant asserted the statements had been obtained in violation of *Miranda* and should have been thrown out. Thus, appellant did raise a specific objection in the trial court but not a timely one.

In addition, even though defense counsel and the prosecutor argued the factors as to whether appellant had been in custody and although the court denied the motion to dismiss, it made no finding on the question of custody or expressed any ruling on the issue of the alleged *Miranda* violation. Appellant never pressed the court for a ruling of the *Miranda* issue. """[W]here the court, through inadvertence or neglect, neither rules nor reserves its ruling . . . the party who objected must make some effort to have the court *actually rule*. If the point is not pressed and is forgotten, he may be deemed to have waived or abandoned it, just as if he had failed to make the objection in the first place."""" (Original italics) (*People v. Brewer* (2000) 81 Cal.App.4th 442, 459.) However, we are reluctant to find appellant forfeited a *Miranda* violation claim and will address the issue to forestall a later claim of inadequate representation. (See *People v. Mattson*, *supra*, 50 Cal.3d at p. 854.)

The Supreme Court has noted that "findings on whether there was a custodial interrogation -- which appears to be a predominately factual mixed question -- are reviewed for substantial evidence or 'clear error.'" (*People v. Mickey* (1991) 54 Cal.3d 612, 649.) However, in *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1161 the court stated: "On appeal, we accept the trial court's findings if supported by substantial evidence but independently determine whether the interrogation was 'custodial.'" As the

court made no findings, we must independently determine whether appellant was in custody at the time he made his statements based on the record presented.

"But *Miranda* made clear that the rule was only applicable to custodial interrogation, which means, 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a '"formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' The deprivation can be constructive as well as actual. '[C]ustody occurs if the suspect is physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived.'" (Citations omitted.) (*In re Kenneth S., supra,* 133 Cal.App.4th at p. 64.)

"Courts have identified a variety of relevant circumstances. Among them are whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation." (*People v. Aguilera, supra,* 51 Cal.App.4th at p. 1162.)

"The objective circumstances of the interrogation, not the subjective intention of the interrogating officer or the subjective understanding of the person being questioned,

is evaluated in determining whether the person was in custody at the time of the questioning. 'A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time'; rather, 'the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.' The United State Supreme Court has made clear, in no uncertain terms, that any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of *Miranda*. An officer's knowledge or beliefs may bear upon the custody issue only if they are conveyed, by word or deed, to the individual being questioned. But '[e]ven a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue. . . .'" (Citations omitted.) (*In re Kenneth S., supra,* 133 Cal.App.4th at p. 64.)

Appellant posits the overall tenor of the interview was custodial because his family was not notified, the police initiated the contact, he was denied his request to use the restroom or for lunch, the officer used a ruse, the confession was placed in front of him without telling him he was able to contact anyone. Based on the evidence presented, i.e., without the taped recording of the interview or a chance to examine Silva and appellant about the interview, though a close question, we conclude appellant was not in custody as he was not deprived of his freedom in any significant way. The interview occurred at school, not at the police station. There is no indication appellant was restrained in any way. According to Silva, the interview was short (30 minutes), he told appellant that he (appellant) was not under arrest and was free to leave. Appellant agreed to talk to Silva. Though the school resource officer was in and out of the office, only Silva interviewed appellant, who asked to speak to Silva alone when he admitted to the lewd behavior, the details of which were consistent with those testified to by J.M., the victim.

Moreover, because appellant did not raise the *Miranda* issue until after he had testified, the statements could have been used to impeach him. (See *Harris v. New York*

(1971) 401 U.S. 222, 223-224.) Accordingly, there was no error in admitting the statements.

II. Substantial Evidence

"'The standard of proof in juvenile proceedings involving criminal acts is the same as the standard in adult criminal trials.' In considering the sufficiency of the evidence in a juvenile proceeding, the appellate court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence and we must make all reasonable inferences that support the finding of the juvenile court.'" (Citations omitted.) (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088-1089.)

The court sustained the petition alleging appellant had committed a forcible lewd act upon a child in violation of section 288, subdivision (b)(1), which required the act be committed "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person."

Appellant contends there is no substantial evidence supporting that finding as the force referred to in subdivision (b)(1) must be "substantially different or substantially greater than that necessary to accomplish the lewd act itself." (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474.) The amount of force necessary is that force which is sufficient to overcome the victim's will. (*In re Asencio* (2008) 166 Cal.App.4th 1195, 1200; *People v. Bolander* (1994) 23 Cal.App.4th 155, 161; *People v. Cicero*, *supra*, 157 Cal.App.3d at p. 480.)

Appellant argues there was no evidence of force as there was no evidence that he picked up J.M. and placed her on the bed (i.e., moved her from another location), that she resisted or that he forcibly prevented her efforts to escape. Appellant suggests there was only evidence J.M. asked him to stop not that he restrained her as she could not

remember why she could not get up and no consistent evidence he a placed a blanket over her head or in her mouth.

There is substantial evidence appellant used force to overcome J.M.'s will; appellant locked the bedroom door, laid J.M. on the bed and pulled down her pants. J.M. testified she tried to leave, but was unable to get up. Appellant was 16 years old, J.M. was 5 years old, and the prosecutor referred to the differences in their sizes. It is reasonable to infer she could not get up because of his body weight. In addition, J.M. was crying, in pain and asked appellant to stop, but he persisted. J.M. testified appellant asked her to bite on a blanket. In its role of trier of fact, the court found J.M. was credible and appellant's witnesses were not. Those acts to overcome J.M.'s will constitute force greater than that necessary to accomplish the lewd act.

DISPOSITION

The judgment is affirmed.

WOODS, Acting P. J.

ZELON, J. **JACKSON, J.**